United States District Court, Southern District of New York

Civil Action No. 52–38

COLUMBIA BROADCASTING SYSTEM, INC.,
PLAINTIFF-APPELLEE

against

UNITED STATES OF AMERICA, DEFENDANT,
FEDERAL COMMUNICATIONS COMMISSION,
DEFENDANT-APPELLANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 12, as amended, of the Rules of the Supreme Court of the United States, the Federal Communications Commission respectfully submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this case on March 11, 1953.

OPINIONS BELOW

The Report and Order of the Federal Communications Commission is not yet officially reported. It may be found in Vol. I, Part 3, Pike & Fischer R. R. 91:231. The majority and dissenting opinions of the United States District Court for the Southern District of New York are

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not yet reported. Copies of these documents are attached hereto.*

JURISDICTION

The judgment of the specially-constituted, three-judge district court, sustaining in part and setting aside in part the rules adopted by the Federal Communications Commission, was entered on March 11, 1953. A petition for appeal is presented herewith on May 8, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *National Broadcasting Company, Inc.* v. *United States,* 319 U. S. 190; *Radio Corporation of America* v. *United States,* 341 U. S. 412.

QUESTION PRESENTED

The district court sustained in part and, by a divided vote, set aside in part certain rules adopted by the Federal Communications Commission pertaining to the licensing of radio and television stations which engage in the broadcast of lotteries. The rules adopted by the Commission represent an interpretation of Section 1304 of the Criminal Code, 18 U. S. C. 1304, which

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*(Clerk's Note. These opinions are printed as appendices to the Statement as to Jurisdiction in *F. C. C.* v. *American Broadcasting Company, Inc.*, No. 117, October Term, 1953, and are not reprinted here.)

prohibits the broadcast of lotteries. The question presented on this appeal is:

1. Whether subdivisions (2), (3) and (4) of paragraph (b) of the rules, which delineate the element of lottery consideration in terms of required or induced attention to radio or television programs, constitute a correct interpretation of 18 U. S. C. 1304.

STATUTES INVOLVED

18 U. S. C. 1304 and pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.*, are set forth in the Appendix hereto.*

STATEMENT

The plaintiff-appellee, Columbia Broadcasting System, Inc., is the licensee of radio and television broadcast stations subject to regulations by the Federal Communications Commission. On August 18, 1949 the Commission adopted a Report and Order, released August 19, 1949, adopting new Sections 3.192, 3.292 and 3.656[1] of its Rules and Regulations (14 F. R. 5432). These rules, which are identical, apply to commercial standard broadcast (AM), FM broadcast, and television broadcast stations, respectively. They were adopted after rule making proceedings con-

*(See Clerk's Note, Page 2.)

[1] Section 3.656 was originally Section 3.692. It was renumbered by the Commission's Sixth Report and Order in Docket No. 8736, *et al.*, adopted April 11, 1952 (17 F. R. 3905).

ducted in conformity to the provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*), including notices of proposed rule making, the submission and consideration of briefs and written comments by a number of parties of which appellee was one, and oral argument before the Commission *en banc,* in which appellee also participated.

In its Report and Order adopting the foregoing rules, the Commission recognized that Section 1304 of the Criminal Code, which prohibits the broadcasting of lotteries and similar schemes, is a declaration by Congress directly applicable to exercise of the Commission's power and duty to grant broadcasting licenses only if public interest, convenience, and necessity will thereby be served. The Commission's rules, promulgated pursuant to its licensing and rule-making powers, were designed to give effect to the policy of Section 1304, under the statutory standard of public interest and necessity governing all grants of broadcasting licenses. The rules provide:

> *Lotteries and Give-Away Programs*—(a) An application for construction permit, license, renewal of license, or any other authorization for the operaton of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting "the broadcasting of any advertisement of or information concerning

any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes." (See U. S. C. § 1304).

(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given

on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the perscribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

After the promulgation of the rules, appellee brought the present action in the United States District Court for the Southern District of New York, under Section 402 (a) of the Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 47 U. S. C. 402 (a); 28 U. S. C. 1336, 1398, 2284, 2321–5; and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009,[2]

[2] Public Law 901, 81st Cong., 2d Session, 64 Stat. 1129, 5 U. S. C. 1031, *et seq.*, has since changed the procedure under Section 402 (a) of the Communications Act to provide for review by courts of appeals rather than by district courts. That procedure is inapplicable to actions, such as the present one, which were commenced prior to its enactment. Section 14.

seeking a permanent injunction against enforcement of the rules. The district court granted a temporary restraining order, after which the Commission issued an order suspending the effective date of the rule pending a final determination of the action. The action was heard by the district court (the argument being consolidated with the argument in two companion actions brought by National Broadcasting Company, Inc. and American Broadcasting Company, Inc. (now American Broadcasting-Paramount Theatres, Inc.)) on cross motions for summary judgment. The district court handed down its decision on February 5, 1953, sustaining the Commission's authority to adopt the rules and the interpretation of 18 U. S. C. 1304 contained in the rules, with the exception of subdivisions (2), (3) and (4) of paragraph (b) of the rules. These subsections delineate those schemes which directly or indirectly require the audience to listen to, or view, the program as a condition of being eligible to win a prize. The majority of the district court held, Circuit Judge Clark dissenting, that 18 U. S. C. 1304, which the rules interpret, requires the payment of a price or thing of value as the consideration element of a lottery.

Judge Clark, dissenting, ascribed the majority's view to

> * * * the odd mistake that what is involved as the "price" or "valuable con-

sideration" (terms themselves constituting an overprecise formulation of the issue, as I have pointed out) is not value "to the station or sponsor," but "It is the value to the participant of what he gives that must be weighed." Of course, the participant must yield something; if he is quite supine, there would be a gift. But surely the application made by my brothers quite inverts the requirement and makes it meaningless and irrational. It is what the operator receives—in terms of value to himself—which must necessarily mark the difference between a gift and a chance, between altruism and business. The opinion appears to hold that while receiving the benefit of something as valuable as this radio time does not cast doubt upon the sponsor's altruism, yet the participant's expenditure of any pecuniary amount—even "a cent," see note 5 of the opinion—makes the scheme at once illegal. And the amount given need not even go to the operator. Such a view not only makes evasion easy and enforcement in natural course difficult, if not impossible; it also—and I say this with deference—makes the whole approach irrational. To say that here we have pure donation, whereas we would have a lottery if the participant were required to deposit a penny in a collection plate, or even a dime in a March-of-Dimes kettle, just does not make sense. The applicable test is not any strict doctrine of yielding a symbolic peppercorn

to formalize a contract or a conveyance. It is a practical one, perceptive of the fact that the yield to the operator is surely all important. And this is recognized in the well reasoned cases, such as *State* v. *Wilson*, 109 St. 349, 196 A. 757, cited below.

THE QUESTIONS ARE SUBSTANTIAL

This appeal involves the validity of rules of the Federal Communications Commission with respect to the licensing of commercial television and radio stations which have a significant impact upon the regulation and conduct of all such stations in the United States. Moreover, the rules rest upon an interpretation of a Federal criminal statute upon which the district court divided, and which should receive the definitive consideration of the Supreme Court.

As the record of this case shows, the so-called give-away programs, which offer prizes to members of the home audience as a means of inducing attention to radio and television advertising, have had recurrent periods of great popularity running back at least as far as 1940. During this period they have also been a matter of concern to the Federal Communications Commission, particularly in view of Section 1304 of Title 18, United States Code (formerly Section 316 of the Communications Act), which specifically makes the broadcast of a lottery a criminal offense. In view of the importance of the problem to ad-

ministration of the Communications Act and the uncertainty in which licensees found themselves due to the lack of decisive Federal precedents and extreme confusion among state courts in interpreting state anti-lottery statutes, the Commission undertook rule-making proceedings in aid of its licensing functions in order to clarify the responsibilities of broadcast licensees in this field in advance of individual licensing proceedings. The rules here at issue are the outcome of these proceedings.

The Supreme Court ruled upon the substance of the Federal anti-lottery statutes in the leading case of *Horner* v. *United States,* 147 U. S. 449. In that case a scheme under which the Austrian Government sold bonds, each bond being accompanied by a ticket entitling the holder to a chance in a drawing for the distirbution of large sums of money, was found to be an illegal lottery.[3] Since that time the various state anti-lottery statutes and the Federal laws have been interpreted in a great number of decisions bearing on the problem involved in this appeal of what constitutes sufficient consideration to make a scheme a lottery. The result of these divers decisions under divers statutes is considerable confusion; collection of the cases becomes a "barren task," as Judge Clark stated in his dissent in

[3] In *Federal Trade Commission* v. *Keppel*, 291 U. S. 304, the use of a lottery device in selling a product has been condemned as unfair competition.

the court below. The decided cases may be generally catalogued as those requiring a valuable consideration paid directly for the chance to win a prize (see, e. g., *Affiliated Enterprises, Inc.* v. *Rock-Ola Manufacturing Corp.*, 23 F. Supp. 3 (N. D. Ill.); *State* v. *Hundling*, 220 Iowa 1369, 264 N. W. 608; *Griffith Amusement Co.* v. *Morgan*, 98 S. W. 2d 844 (Ct. of Civ. App., Texas)) and those recognizing that a substantial benefit to the promoter which flows from the participants, and is necessary in order to have an opportunity to win, is sufficient to stamp the scheme a lottery (see, e. g., *Affiliated Enterprises, Inc.* v. *Waller*, 40 Del. 28, 5 A. 2d 257; *Maughs* v. *Porter*, 157 Va. 415, 161 S. E. 242; *Brooklyn Daily Eagle* v. *Voorhies*, 181 Fed. 579, 581 (C. C. E. D. N. Y.); *Affiliated Enterprises, Inc.* v. *Gantz*, 86 F. 2d 597, 599 (C. A. 10)).

Judge Clark in the court below concisely put the purpose of 18 U. S. C. 1304 when he said:

> Now the essential purpose cannot be oversimplified to debauchery by a single giant lottery, or even several lotteries, as the initial and leading case of *Horner* v. *United Statse*, 147 U. S. 449, is at pains to point out. Rather it is aimed at a somewhat less direct road to waste and want: the lack of industry and initiative induced by initial success in getting valuable returns from the operation of chance. There is also quite specifically the unjust enrich-

ment which accrues to the manipulators of the scheme.

The programs covered by the rules at issue are lotteries by every realistic standard. "Give-away" programs are obviously not eleemosynary affairs, but are founded upon an expected return in profits to the sponsor and increased sales of radio time on the part of the station. The requirement of a prepaid monetary consideration as an essential element of a lottery, a requirement not in terms found in 18 U. S. C. 1304, is an unrealistic test. The radio stations involved and the promoters of give-away schemes receive tangible benefits from the increased audience lured by hope of winning a prize by chance.

It is submitted that the court below erroneously construed Section 1304, Title 18, U. S. C., and that its decision presents a substantial question of general importance in the regulation of radio and television stations by the Federal Communications Commission.

Respectfully submitted.

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